

Judge Ronald B. Leighton

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MAJOR MARGARET WITT,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF  
THE AIR FORCE, et al.,

Defendants.

No. C06-5195 RBL

**DEFENDANTS' MOTION FOR  
PROTECTIVE ORDER REGARDING  
THE DEPOSITIONS OF UNIT  
MEMBERS**

(Noted for Consideration on March 12,  
2010, pursuant to Local Rule 7(d)(2)(b))

**ORAL ARGUMENT REQUESTED**

**INTRODUCTION**

In challenging the Air Force's "Don't Ask, Don't Tell" policy, plaintiff seeks to depose members of her former unit, the 446th Aeromedical Evacuation Squadron (the "446th AES"). Those depositions should not be permitted because they would be disruptive to military affairs, undermining unit morale and unit cohesion by creating unreasonable annoyance and embarrassment. The proposed depositions would compromise the military's constitutionally protected important interest in unit morale and cohesion by subjecting unit members to questioning on the divisive topic of open homosexuality. Moreover, the proposed depositions of individual unit members would be unduly burdensome, particularly in light of their limited probative value. Plaintiff already has deposed two unit commanders, both of whom are better-

1 positioned than selected unit members to assess the overall impact plaintiff's presence had and  
2 would have on the unit. In the two depositions of unit commanders, plaintiff's counsel has made  
3 extensive inquiries into suspicions about the sexual orientations of members of the 446th AES.  
4 That kind of inquiry directed at selected unit members, while highly disruptive, would serve little  
5 purpose in light of the commanders' assessments, in light of the unit climate surveys that  
6 defendant already has provided to plaintiff, and in light of the fact that the Ninth Circuit  
7 remanded the case for consideration of the effects of plaintiff's sexual conduct on unit cohesion  
8 and morale – not for a free-floating fishing expedition into the sexual practices of the entire unit.  
9 Plaintiff has thus already received more reliable and relevant discovery regarding unit morale and  
10 cohesion from the Air Force than she could get through the proposed unit member depositions.

11 For these reasons, as explained more fully herein, good cause exists to prevent the  
12 depositions of members of the 446th AES, and a protective order should issue to that effect.

### 13 BACKGROUND

14 This case is presently on remand from the Ninth Circuit. On appeal, the Ninth Circuit  
15 affirmed the Court's dismissal of plaintiff's equal protection challenge to the Air Force's "Don't  
16 Ask, Don't Tell" policy (the "DADT" policy), but reversed and remanded the Court's dismissal  
17 of plaintiff's substantive and the procedural due process claims. *See Witt v. Dep't of Air Force*,  
18 527 F.3d 806, 812-13, 821 (9th Cir. 2008). Central to the Ninth Circuit's decision was its  
19 determination that plaintiff's substantive due process claim should be evaluated under an as-  
20 applied, heightened scrutiny framework consisting of three factors. Those three *Witt* factors are  
21 (1) whether unit morale and cohesion constitute important governmental interests; (2) whether  
22 the particular circumstances of plaintiff's discharge significantly further morale and unit  
23 cohesion; and (3) whether plaintiff's discharge was necessary to further unit cohesion and  
24 morale. *See id.* at 818. The Ninth Circuit determined that the first of those *Witt* factors was  
25 satisfied because the Air Force has an important governmental interest in unit morale and unit  
26 cohesion. *See id.* at 821. The remaining two factors are to be evaluated on remand. *See id.* The  
27 Ninth Circuit cautioned, however, that on remand the district court should be mindful of the  
28 deference owed the the government in military affairs. *See id.*

Discovery has commenced on remand. Plaintiff has deposed two commanders of the 446th AES: Colonel Janette Moore-Harbert, the current commander of the 446th AES, and Colonel (Ret.) Mary Walker, a former commander of the 446th AES. Plaintiff has now also noticed the depositions of five current Reserve service members: Capt. Jill (Brinks) Robinson; Master Sgt. Stacey Julian; Master Sgt. Leah Crawford; Lt. Col. Kenneth Winslow; and Lt. Col. Thomas Hansen; as well as the deposition of one retired member of the 446th AES, Capt. (Ret.) Ed Hrivnak, who is married to a current member of the 446th AES. These six depositions have been noticed for March 16, 17, and 18, 2010 (copies of deposition notices attached at Ex. 1). The members of the 446th AES share the mission of deploying aeromedical evacuation crews, operations teams, and supporting personnel and assets to Medevac patients, including military members injured in combat, to appropriate medical treatment facilities. *See* Decl. of Col. Janette Moore-Harbert ¶¶ 6-7 (copy attached at Ex. 2).

### ARGUMENT

Under Civil Rule 26(c)(1), “[a] party or any person from whom discovery is sought may move for a protective order in the court where the action is pending.” Fed. R. Civ. P. 26(c)(1). After the parties have conferred in good faith to resolve a discovery dispute, a protective order is permitted, “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c)(1). Where any of those conditions exist upon a specifically articulated showing of good cause, a court may forbid the requested discovery. *See* Fed. R. Civ. P. 26(c)(1)(a); *see also San Jose Mercury News, Inc. v. U.S. District Court - Northern District (San Jose)*, 187 F.3d 1096, 1103 (9th Cir. 1999); *Stormans, Inc. v. Selecky*, 251 F.R.D. 573, 576 (W.D. Wash. 2008). Under that standard, a court may prevent a proposed deposition “when the facts and circumstances are such that it creates an inappropriate burden or hardship.” *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 70 (2d Cir. 2003). That standard is clearly satisfied here to prevent the noticed depositions.

**I. The Noticed Depositions Would Be Disruptive To The Military, Undermining Unit Cohesion and Morale By Creating Unreasonable Annoyance And Embarrassment.**

A protective order should issue because the noticed depositions of unit members would be disruptive to the military. The importance of avoiding disruption to military affairs cannot be overstated, especially in a time of ongoing conflict in two theaters of war. Concerns regarding the disruption of military functions, such as a second-guessing military decisions and impairments of essential military discipline, have foreclosed entire causes of action. *See United States v. Shearer*, 473 U.S. 52, 57 (1985) (plurality opinion). Under the *Feres* doctrine, for example, the Supreme Court has barred service members from bringing claims under the Federal Tort Claims Act during activity incident to service. *See United States v. Johnson*, 481 U.S. 681, 689-91 (1987) (no Federal Tort Claims Act claims by service members); *Feres*, 340 U.S. 135, 146 (1950) (same). In explaining the *Feres* rationale, the Supreme Court emphasized the importance of not involving military officials in litigation:

To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct. But as we noted in *Chappell v. Wallace*, such “‘complex, subtle, and professional decisions as to the composition, training, . . . and control of a military force are essentially professional military judgments.’”

*Shearer*, 473 U.S. at 58 (citations omitted). This line of reasoning has also led the Supreme Court to hold that no *Bivens* remedy is available for constitutional injuries that “‘arise out of or are in the course of activity incident to service.’” *United States v. Stanley*, 483 U.S. 669, 684 (1987); *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (holding that “‘enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations.’”). Relatedly, the Supreme Court has held that the military’s interest in “‘effective, realistic training” outweighs a plaintiff’s showing of irreparable harm. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008). In short, Supreme Court precedent demonstrates a reluctance to entertain entire classes of claims because “‘the special relationships that define military life have ‘supported the military establishment’s power to deal with its own personnel.’”

1 *Chappell*, 462 U.S. at 305 (1983) (quoting Earl Warren, *The Bill of Rights and the Military*,  
 2 37 N.Y.U. L. Rev. 181, 187 (1962)).

3 The Ninth Circuit has given broad recognition to these principles:

4 Although the doctrine of intramilitary immunity is generally applied in connection  
 5 with the FTCA, its applicability is not limited to FTCA cases. The doctrine is  
 6 instead applicable whenever a legal action “would require a civilian court to  
 examine decisions regarding management, discipline, supervision, and control of  
 members of the armed forces of the United States.”

7 *Hodge v. Dalton*, 107 F.3d 705, 710 (9th Cir. 1997) (quoting *McGowan v. Scoggins*, 890 F.2d  
 8 128, 132 (9th Cir. 1989)). Put another way, “the test has been broadly construed to immunize the  
 9 United States and members of the military from any suit which may ‘intrude in military affairs,’  
 10 ‘second-guess[ ] military decisions,’ or ‘impair[ ] military discipline.’” *Jackson v. Brigle*,  
 11 17 F.3d 280, 282 (9th Cir. 1994) (quoting *Stauber v. Cline*, 837 F.2d 395, 398 (9th Cir. 1988)).  
 12 Toward that end, the Ninth Circuit has precluded suits such as Title VII employment  
 13 discrimination claims brought by service members. *See Mier v. Owens*, 57 F.3d 747, 749 (9th  
 14 Cir. 1995) (“Title VII does not protect military personnel.”); *see also Hodge*, 107 F.3d at 712  
 15 (holding that a uniformed service member “is excluded from coverage under Title VII of the  
 16 Civil Rights Act”); *Gonzalez v. Dep’t of the Army*, 718 F.2d 926 (9th Cir. 1983). The Ninth  
 17 Circuit has also barred constitutional claims brought by a service member on the same rationale.  
 18 *Zaputil v. Cowgill*, 335 F.3d 885, 886-87 (9th Cir. 2003) (barring due process and involuntary  
 19 servitude claims brought by a service member). Put simply, the Ninth Circuit accords great  
 20 weight to *Feres* principles, acknowledging that the doctrine “has been so broadly construed that  
 21 ‘practically any suit that implicates . . . military judgments and decisions runs the risk of  
 22 colliding with *Feres*.’” *Jackson*, 17 F.3d at 282 (quoting *Persons v. United States*, 925 F. 2d  
 23 292, 295 (9th Cir. 1991)).<sup>1</sup>

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24  
 25 <sup>1</sup> The Ninth Circuit has also adopted a test to determine whether a constitutional claim against the  
 26 military is actionable. Under that test:

27 [A]n internal military decision is unreviewable unless the plaintiff alleges (a) a violation  
 28 of [a recognized constitutional right], a federal statute, or military regulations; and (b)  
 exhaustion of available intraservice remedies. If the plaintiff meets both prerequisites,  
 the trial court must weigh four factors to determine whether review should be granted:

(1) The nature and strength of the plaintiff’s claim.

The Ninth Circuit in *Witt* recognized that on remand the Court should be mindful of the deference owed to the military. *See* 527 F.3d at 821. Such deference to the military certainly supports a protective order here with respect to the proposed depositions. The depositions would seek unit members' views on the very topics that the Ninth Circuit has expressly recognized as being invasive. *See McGowan*, 890 F.2d at 132 (noting the applicability of *Feres* principles to "decisions regarding management, discipline, supervision, and control of members of the armed forces of the United States"). Thus, depositions of unit members regarding unit morale and cohesion would necessarily intrude into military affairs. *See Moore-Harbert Decl.* ¶¶ 20-21. And, courts should be extremely reluctant to permit judicial proceedings that would have such effects. *See Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) (explaining that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) ("Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."). For that reason, a protective order is merited here to prevent the service member depositions that would disrupt the military's functioning.

Indeed, the proposed depositions of individual members will not only cause embarrassment, and thus serve to undermine the military's interest in unit cohesion and morale, but also put the deposed unit members in a potentially impossible position. Plaintiff has made clear her intention to probe the sexual activities and orientations of unit members. In the course of deposing two unit commanders, plaintiff's counsel repeatedly asked the commanders about

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- (2) The potential injury to the plaintiff if review is refused.
  - (3) The extent of interference with military functions.
  - (4) The extent to which military discretion or expertise is involved.

*Christoffersen v. Wash. State Air Nat'l Guard*, 855 F.2d 1437 (9th Cir. 1988) (quoting *Khalsa v. Weinberger*, 779 F.2d 1393 (9th Cir. 1985)). The *Witt* panel remanded this matter for fact-finding regarding plaintiff's effect on unit cohesion and morale. It did not, however, specify the type of evidence to be used in that fact-finding. If the *Witt* decision is taken to authorize the unit-level inquests envisioned by plaintiff, it cannot proceed under *Christoffersen* and similar precedents because, at a minimum, it interferes with important military functions – the maintenance of good order, discipline, cohesion and morale – in a matter that has classically received considerable deference to the military's expertise.

any suspicions they had about the presence of homosexually-oriented persons in the military. For instance, in the deposition of plaintiff's former commander, Colonel Mary Walker, counsel engaged in the following line of questions:

Q: What I'm going to do now is somewhat laboriously go through a list of names of individuals just to make sure that -- I know you've already told me no, but I want to see if telling you a name jogs any kind of recollection. ***So, I'm going to ask you if you ever knew or suspected that any of these people were gay or lesbian.*** Okay?

A: Okay.

Q: Tech Sergeant Stacey Julian?

A: No.

Q: Sergeant James Schaffer?

A: No.

Q: Major Faith Mueller?

A: No.

Q: Major Julia Scott?

A: No.

Q: Major Sue Schindler?

A: No.

Q: Major Sharon Carlson?

A: No.

Q: Master Sergeant Jill Brinks?

A: No.

Q: Major Annie Thomas?

A: No.

Q: Major Vince Oda?

A: No.

Q: Tech Sergeant Leah Crawford?

A: No.

Q: Major Kenneth Winslow?

A: No.

Q: Major Carolyn Newhouse?

A: No.

Q: Captain Ed --

A: Hrivnak.

Q: H-r-i-v-n-a-k?

A: No.

Q: Sergeant Aaron Maness?

A: No.

Q: Lieutenant Jill Brinks?

A: No.

Q: Lieutenant Colonel Bethany Ruals?

A: No.

Q: Colonel Bruce Daugherty?

A: No.

Q: Sergeant Candace Newberry?

A: No.

Q: Sergeant Theron Smith?

A: Theron.

Q: Theron?

A: No.

Q: Sergeant Charlene Livingston?



1 A: No.

2 Depo. of Col. (Ret.) Mary Walker at 48-50 (Jan. 8, 2010) (emphasis added) (copy attached at  
3 Ex. 3). Five of the members identified in this line of questioning are persons who plaintiff has  
4 currently noticed for deposition (Brinks, Julian, Crawford, Winslow, and Hrivnak).

5 Plaintiff persisted in a similar line of questions in the deposition of Colonel Janette  
6 Moore-Harbert, the current commander of the 446th Aeromedical Evacuation Squadron:

7 Q: And using suspect the way I said it, that is that it crosses your mind to  
8 think this person probably is of this sexual orientation. In thirty-two years  
9 other than Major Witt have you ever suspected any other person in the  
10 Armed Forces to be gay or lesbian?

11 A: I don't know.

12 Depo. of Col. Janette Moore-Harbert at 79-80 (Feb. 24, 2010) (objections omitted) (copy  
13 attached at Ex. 4).<sup>2</sup>

14 Such questioning is inherently disrespectful of privacy and potentially embarrassing to  
15 both the object of the inquiry and the witness. More than that, it could place the unit members  
16 between a rock and a hard place – to compel them, under penalty of perjury, to disclose their own  
17 sexual activities and orientations, or opine on those of others, possibly triggering the application  
18 of the DADT policy. This type of inquiry potentially creates tension, hostility, and/or dissension  
19 among members of the unit. *See* Moore-Harbert Decl. ¶¶ 20-21. Indeed, this questioning is  
20 inconsistent with the Air Force's regulation that regards sexual orientation as "a personal and a  
21 private matter." *See* Dep't of Defense Directive 1304.26, attach. 2 § 8(a), p. 2-5; Air Force  
22 Instruction 36-3209 ¶ 1.15 ("Sexual orientation is considered a private matter and is not a bar to  
23 continued service unless manifested by homosexual conduct."). It is ironic that in the name of  
24 challenging the application of the DADT policy on privacy and personal autonomy grounds,  
25 plaintiff seeks to probe the sexual behavior of military members, even as the very policy that  
26 plaintiff attacks provides that sexual orientation is a private matter. Moreover, the Ninth Circuit  
27 in *Witt* made clear that it was remanding for an inquiry into how the DADT policy, as applied

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28 <sup>2</sup> Plaintiff has also recently served requests for document production that inquire into the specific  
relationships between various members of the 446th AES. *See* Pl's Second Set of Requests for Produc.  
of Docs., Nos. 35-36 (copy attached at Ex. 5); *see also id.* Nos. 33-34.



1 “specifically to Major Witt,” affected unit cohesion and morale; it did not suggest that plaintiff  
 2 probe the sexual orientation and conduct of other unit members. 527 F.3d at 821. Such an  
 3 intrusive inquiry does not justify the embarrassment that it would cause or the consequent  
 4 disruption to the military, and the Court should enter a protective order precluding the proposed  
 5 depositions. *See Gay-Straight Alliance of Okeechobee High Sch. v. Sch. Bd. of Okeechobee*  
 6 *County*, 242 F.R.D. 644, 645 (S.D. Fla. 2007) (issuing a protective order to prevent inquiry into  
 7 sexual orientation of members in plaintiff organization).

8 As further evidence still, some of the affidavits that plaintiff’s counsel already has  
 9 obtained in this case are embarrassing to unit personnel in a way corrosive to the 446th AES’s  
 10 morale and cohesion. For instance, in his declaration in support of plaintiff’s preliminary  
 11 injunction motion, Senior Master Sergeant James Schaffer claimed that the current commander  
 12 of the 446th AES, Colonel Moore-Harbert, reported crying when she delivered the suspension  
 13 paperwork to plaintiff. Decl. of James Schaffer ¶ 12 (“Colonel Moore-Harbert told me that she  
 14 cried when she told Major Witt of Colonel Walker’s action.”) (copy attached at Ex. 6). Such a  
 15 (disputed) report that a commander cried is, at a minimum, embarrassing to the current  
 16 commander and the military leadership. *See Moore-Harbert Depo.* at 141 (“Q: Is it embarrassing  
 17 to an officer in the military to cry in front of other military members? A: I think it would depend  
 18 on the officer. Q: How about you? A: I find it difficult and embarrassing to cry in front of  
 19 people.” (objection omitted)). More importantly, such reports of a commander crying are  
 20 disruptive to the commander’s ability to lead the unit because they call into doubt the  
 21 commander’s ability to be strong. *See Moore-Harbert Depo.* at 143 (“A: And I think that across  
 22 the board especially if you are in somewhat of a leadership-type position that you want to be able  
 23 to demonstrate that you are strong. And that you can continue, that you won’t emotionally break  
 24 down in an issue \* \* \* And I think that is what leads towards the aspect about seeing someone  
 25 that is of a senior position crying that that is difficult.”). These examples underscore the invasive  
 26 nature of plaintiff’s discovery, and there can be little doubt that the depositions of unit members  
 27 would be distracting to the military’s mission.

28 Finally, on appeal, the Ninth Circuit recognized as part of its constitutional analysis that

1 the Air Force had important governmental interests in unit morale and cohesion. *See Witt v.*  
 2 *Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008). In the parlance of constitutional  
 3 jurisprudence, these interests were deemed “important,” meaning that they were more protected  
 4 than simply “legitimate” governmental interests. Yet, through the noticed depositions, plaintiff  
 5 would compromise the Air Force’s important governmental interests. By questioning unit  
 6 members on such a controversial topic as gay rights or more specifically, the application of the  
 7 DADT policy to a certain unit member, plaintiff risks factionalizing the unit. As explained by  
 8 General Colin Powell as quoted in the Senate Report:

9 [O]pen homosexuality in units is not just the acceptance of benign characteristics  
 10 such as color or gender or background. It involves matters of privacy and human  
 11 sexuality that, in our judgment, if allowed to exist openly in the military, would  
 12 affect the cohesion and well-being of the force. ***It asks us to deal with***  
 13 ***fundamental issues that the society at large has not yet been able to deal with.***

14 S. Rep. No. 103-112, at 291 (1993) (emphasis added). Thus, simply by inquiring into unit  
 15 morale and cohesion, plaintiff would compromise the Air Force’s important constitutional  
 16 interests. Even where no important governmental interest was found, the Supreme Court  
 17 recognized that “[s]uits brought by servicemembers against the Government for service-related  
 18 injuries could undermine the commitment essential to effective service and thus have the  
 19 potential to disrupt military discipline in the broadest sense of the word.” *Johnson*, 481 U.S. at  
 20 691. The same concern is present here to a greater degree due to the Air Force’s important  
 21 constitutional interest in unit morale and cohesion.

22 In short, the discovery of unit members would be disruptive to the military and would  
 23 undermine the Air Force’s constitutionally recognized important governmental interest in unit  
 24 morale and cohesion. For these reasons, the proposed depositions should not be permitted.

## 25 **II. The Noticed Depositions Are Unduly Burdensome.**

26 In recognition of the scope of remand, the Air Force has made significant information  
 27 available to plaintiff concerning unit morale and cohesion. The Air Force has permitted plaintiff  
 28 to depose the commanders of the 446th AES, and the Air Force has produced anonymously  
 conducted unit climate surveys from the 446th AES. The availability of those other resources  
 underscores that unit member depositions are unduly burdensome, especially when their

1 disruption on unit cohesion and morale is contrasted with their minimal probative value. *See*  
2 *United Air Lines v. United States*, 26 F.R.D. 213, 219 n.9 (D. Del. 1960) (“It is well established  
3 that discovery has limits and that these limits grow more formidable as the showing of need  
4 decreases.”).

5 Good cause exists for the Air Force’s decision to permit plaintiff to depose the  
6 commanders of the 446th AES, but not the unit members. The recognized concept of “unit  
7 cohesion and morale” requires an ability to assess the overall cohesion of the unit (or others that  
8 the 446th AES would work with), and the commanders are in the best position to make that  
9 evaluation. *See* Moore-Harbert Decl. ¶¶ 22-23. For example, the commanders had access to unit  
10 climate surveys, which gauge the morale of the 446th AES at various points in time. *See id.*

11 In contrast, plaintiff’s efforts to depose members of the unit will produce only limited  
12 anecdotal evidence. An individual unit member is not in a position to assess the unit’s overall  
13 measure of cohesiveness or morale. But a unit commander is. *See id.* Even if plaintiff were to  
14 depose and inquire of every single unit member, there would be no reliable method, other than  
15 the unit commander’s assessment, to evaluate the overall cohesiveness and morale of the unit as  
16 a whole. Nor would the depositions of unit members provide any new insight into plaintiff’s on-  
17 the-job performance – the unit commanders have already stated that plaintiff was a very good and  
18 respected flight nurse. *See, e.g., id.* ¶ 5; Walker Depo. at 145. Thus, depositions of unit  
19 members, while invasive and highly disruptive (as set forth above), would be of limited probative  
20 value and thus unduly burdensome. Rather than offering the Court any meaningful evidence to  
21 evaluate the case, the depositions would inject a controversial issue into the midst of a unit that is  
22 actively deploying in support of its mission at a time when the military is engaged in two  
23 conflicts among other operations. *See* Moore-Harbert Decl. ¶¶ 20-23. In short, these depositions  
24 offer little and come at too high a cost.

## 25 CONCLUSION

26 For the foregoing reasons, good cause exists to issue a protective order to preclude  
27 plaintiff from deposing members of the 446th Aeromedical Evacuation Squadron, and  
28 defendants’ motion should be granted.

1 Dated: March 4, 2010

Respectfully submitted,

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